

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

DANIEL PATRICK HARD,

Plaintiff,

v.

LAKE COUNTY DEPARTMENT OF  
SOCIAL SERVICES, et al.,

Defendants.

No. C 14-4610 EDL (PR)

**ORDER OF PARTIAL  
DISMISSAL; ORDER OF  
SERVICE**

Plaintiff, a Mississippi prisoner proceeding pro se, has filed a civil rights complaint under 42 U.S.C. § 1983, alleging that Lake County officials have deprived him of due process regarding plaintiff's real property. Plaintiff has consented to magistrate judge jurisdiction. (Docket No. 6.) Plaintiff is granted leave to proceed in forma pauperis in a separate order. For the reasons that follow, plaintiff's complaint is dismissed in part, and served on the remaining defendants.

**DISCUSSION**

**A. Standard of Review**

Federal courts must engage in a preliminary screening of cases in which prisoners seek redress from a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). In its review the court must identify any cognizable claims, and dismiss any claims which are frivolous, malicious, fail to state a claim upon which relief may be granted, or seek monetary relief from a defendant who is immune from such relief. *Id.* at 1915A(b)(1),(2). Pro se pleadings must be liberally construed. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990).

To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential elements: (1) that a right secured by the Constitution or laws of the United States was

1 violated, and (2) that the alleged deprivation was committed by a person acting under the  
2 color of state law. *West v. Atkins*, 487 U.S. 42, 48 (1988).

3 **B. Legal Claims**

4 Although difficult to fully comprehend, plaintiff appears to allege that he entered into  
5 a contract with Cecil Dunn. The contract stated that plaintiff would pay \$300.00 a month to  
6 inhabit and maintain two properties in Lake County belonging to Mr. Dunn, in consideration  
7 for some kind of proprietary ownership. Apparently, Mr. Dunn has since been deemed  
8 incompetent. After a hearing declaring Mr. Dunn incompetent, defendant case workers Pat  
9 Cichowicz and James Grogg evicted plaintiff and seized all of plaintiff's property without  
10 due process. Liberally construed, plaintiff has stated a cognizable claim that defendants  
11 Pat Cichowicz and James Grogg deprived plaintiff of his right to due process.

12 Plaintiff has also named the Estate of Cecil Dunn as a defendant. However, there is  
13 no indication that the Estate of Cecil Dunn is a state actor, and thus, it is not acting under  
14 the color of state law, as required to state a civil rights claim against it. Nor is there any  
15 evidence that the Estate of Cecil Dunn acted or failed to act in a manner to deprive plaintiff  
16 of his due process. Accordingly, the Estate of Cecil Dunn is DISMISSED from this action.  
17 Because it is beyond doubt that plaintiff can provide a set of facts against the Estate of  
18 Cecil Dunn such that he states a cognizable claim, the dismissal is without leave to amend.

19 Plaintiff also names as a defendant Lake County Department of Social Services.  
20 However, to impose municipal liability under § 1983 for a violation of constitutional rights, a  
21 plaintiff must show: (1) that the plaintiff possessed a constitutional right of which he or she  
22 was deprived; (2) that the municipality had a policy; (3) that this policy amounts to  
23 deliberate indifference to the plaintiff's constitutional rights; and (4) that the policy is the  
24 moving force behind the constitutional violation. *See Plumeau v. School Dist. #40 County*  
25 *of Yamhill*, 130 F.3d 432, 438 (9th Cir. 1997). Plaintiff has not done so. Accordingly, Lake  
26 County Department of Social Services is DISMISSED from this action. If plaintiff believes  
27 that he can allege a constitutional claim against Lake County Department of Social  
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Services, he may amend his complaint within twenty-eight days to do so. Plaintiff is warned that an amended complaint supersedes the original complaint. Claims not included in an amended complaint are no longer claims and defendants not named in an amended complaint are no longer defendants. See *Ferdik v. Bonzelet*, 963 F.2d 1258, 1262 (9th Cir.1992).

### C. Preliminary Injunction/Temporary Restraining Order

Plaintiff moves for a preliminary injunction and temporary restraining order to prohibit defendants from selling the Lake County properties. Federal Rule of Civil Procedure 65 sets forth the procedure for issuance of a preliminary injunction or temporary restraining order ("TRO"). However, prior to granting a preliminary injunction, notice to the adverse party is required. See Fed. R. Civ. P. 65(a)(1). Therefore, a motion for preliminary injunction cannot be decided until the parties to the action are served. See *Zepeda v. INS*, 753 F.2d 719, 727 (9th Cir. 1983).

In addition, plaintiff has not satisfied the requirements necessary to grant a TRO. See Fed. R. Civ. P. 65(b) (stating that a TRO may be granted without notice to the adverse party or that party's attorney only if: (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition; and (2) the movant's attorney certifies in writing any efforts made to give notice and the reasons why it should not be required). Accordingly, plaintiff's request for a preliminary injunction and a TRO are DENIED without prejudice.

### CONCLUSION

1. Defendant Estate of Cecil Dunn is DISMISSED without leave to amend.
2. Defendant Lake County Department of Social Services is DISMISSED with leave to amend. Should plaintiff wish to amend his complaint, the amended complaint must be filed within **twenty-eight days** of the filing date of this order and must include the caption and civil case number used in this order and the words AMENDED COMPLAINT on

1 the first page. Because an amended complaint completely replaces the original complaint,  
2 plaintiff must include in it all the claims he wishes to present. *See Ferdik v. Bonzelet*, 963  
3 F.2d 1258, 1262 (9th Cir. 1992). He may not incorporate material from the original  
4 complaint by reference. Failure to file an amended complaint within the designated time  
5 will result in the court proceeding only with defendants Pat Cichowicz and James Grogg .

6 3. The clerk of the court shall mail a Notice of Lawsuit and Request for Waiver of  
7 Service of Summons, two copies of the Waiver of Service of Summons, a copy of the  
8 complaint and all attachments thereto, a magistrate judge jurisdiction consent form, and a  
9 copy of this order to case workers Pat Cichowicz and James Grogg at the Lake County  
10 Department of Social Services, 255 North Forbes Street, Lakeport, CA 95453.. The clerk  
11 of the court shall also mail a courtesy copy of the complaint and a copy of this order to the  
12 Lake County District Attorney's Office. Additionally, the clerk shall mail a copy of this order  
13 to plaintiff.

14 4. Defendants are cautioned that Rule 4 of the Federal Rules of Civil Procedure  
15 requires them to cooperate in saving unnecessary costs of service of the summons and  
16 complaint. Pursuant to Rule 4, if defendants, after being notified of this action and asked  
17 by the court, on behalf of plaintiff, to waive service of the summons, fail to do so, they will  
18 be required to bear the cost of such service unless good cause be shown for their failure to  
19 sign and return the waiver form. If service is waived, defendants will be required to serve  
20 and file an answer within sixty (60) days from the date on which the request for waiver was  
21 sent to them. Defendants are asked to read the statement set forth at the bottom of the  
22 waiver form that more completely describes the duties of the parties with regard to waiver  
23 of service of the summons. If service is waived after the date provided in the Notice but  
24 before defendants have been personally served, the Answer shall be due sixty (60) days  
25 from the date on which the request for waiver was sent or twenty (20) days from the date  
26 the waiver form is filed, whichever is later.

27 5. In order to expedite the resolution of this case, the court orders as follows:  
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1 a. No later than sixty days from the date the waivers are sent from the court,  
2 defendants shall file a motion for summary judgment or other dispositive motion. The  
3 motion shall be supported by adequate factual documentation and shall conform in all  
4 respects to Federal Rule of Civil Procedure 56, and shall include as exhibits all records and  
5 incident reports stemming from the events at issue. If defendants are of the opinion that  
6 this case cannot be resolved by summary judgment, they shall so inform the court prior to  
7 the date their summary judgment motion is due. All papers filed with the court shall be  
8 promptly served on plaintiff.

9 b. At the time the dispositive motion is served, defendants shall also serve,  
10 on a separate paper, the appropriate notice or notices required by *Rand v. Rowland*, 154  
11 F.3d 952, 953-954 (9th Cir. 1998) (en banc), and *Wyatt v. Terhune*, 315 F.3d 1108, 1120  
12 n.4 (9th Cir. 2003). See *Woods v. Carey*, 684 F.3d 934, 940-941 (9th Cir. 2012). At that  
13 time, defendants shall also submit the magistrate judge jurisdiction consent form.

14 c. Plaintiff's opposition to the dispositive motion shall be filed with the court  
15 and served upon defendants no later than twenty-eight days from the date the motion was  
16 served upon him.

17 d. Defendants shall file their reply brief no later than fourteen days after the  
18 opposition is served upon them.

19 e. The motion shall be deemed submitted as of the date the reply brief is  
20 due. No hearing will be held on the motion unless the court so orders at a later date.

21 6. All communications by plaintiff with the court must be served on defendants,  
22 or defendants' counsel once counsel has been designated, by mailing a true copy of the  
23 document to defendants or defendants' counsel.

24 7. Discovery may be taken in accordance with the Federal Rules of Civil  
25 Procedure. No further court order under Federal Rule of Civil Procedure 30(a)(2) is  
26 required before the parties may conduct discovery.

27 8. It is plaintiff's responsibility to prosecute this case. Plaintiff must keep the  
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1 court informed of any change of address by filing a separate paper with the clerk headed  
2 "Notice of Change of Address." He also must comply with the court's orders in a timely  
3 fashion. Failure to do so may result in the dismissal of this action for failure to prosecute  
4 pursuant to Federal Rule of Civil Procedure 41(b).

5 **IT IS SO ORDERED.**

6 Dated: February 13, 2015.

  
ELIZABETH D. LAPORTE  
United States Magistrate Judge

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